95-958 (1)

Supreme Court, U.S.
FILED
DEC 12 1995
CLERK

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

GLADYCE E. NELSON

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent.

Petition For Writ Of Certiorari
From An Appeal To The United
States Court Of Appeals For
The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

GLADYCE E. NELSON
3016 Canvasback Way
W. Sacramento, CA.95691
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49 pp

QUESTIONS PRESENTED

I. Whether the Court below erred when they denied Gladyce E. Nelson's right to a former spouse survivor annuity benefit because the decision was contrary to the statute and legislative intent?

II. Whether OPM is estopped from denying Gladyce's right to a partial survivor annuity benefit?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Gladyce E. Nelson. Mrs. Nelson was Petitioner in the United States Court of Appeals for the Federal Circuit.

2. Respondent is Office of Personnel Management. The Office of Personnel Management was the respondent in the United States Court of Appeals for the Federal Circuit.

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OFFICE OF PERSONNEL MANAGEMENT
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Petition For Writ Of Certiorari
From An Appeal To The United
States Court Of Appeals For
The Federal Circuit

Gladyce E. Nelson respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND JUDGMENTS BELOW

The Decision of the United States Court of Appeals for the Federal Circuit was entered on February 22, 1995 and appears at Appendix A to this Petition.

The Initial Decision of the Merit Systems Protection Board (Board) dated June 21, 1993 was affirmed. It appears at

Appendix B to this Petition.

The Final Order of the Board dated November 16, 1993 was affirmed. It appears at Appendix C to this Petition.

The Order of the U. S. Court of Appeals for the Federal Circuit dated July 17, 1995 denied the petition for rehearing and declined the suggestion for rehearing in banc. It appears as Appendix D.

JURISDICTION

This petition is filed within the extension granted by the Chief Justice, who on September 22, 1995, extended the time to and including December 14, 1995 as permitted by Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

STATUTORY PROVISIONS

The Civil Service Spouse Equity Act, (CSRSEA), Public Law 98-615, effective May 7, 1985 as amended by the Federal Employees Benefits Improvement Act, (FEBIA), Public Law 99-251, effective February 27, 1986.

STATEMENT OF THE CASE

Joseph Nelson (Joseph) retired under the Civil Service Retirement System on July 20, 1979. He was married at

retirement, and elected the full survivor annuity benefit (benefit) for his first wife, Gertrude. She died in 1984. Joseph married Gladyce E. Nelson (Gladyce) on September 20, 1986. In an irrevocable election in February 1987, Joseph named Gladyce as the beneficiary of a partial benefit. The required deposit, $6,792.84, was sent to the Office of Personnel Management (OPM). Joseph's annuity was reduced to fund the benefit.

On February 1, 1990, Joseph contacted OPM requesting information on survivor annuity benefit court orders upon a divorce. OPM's reply letter dated March 16, 1990 stated that a court order could retain the benefit after a divorce. OPM's letter cited Joseph's Civil Service Annuity (CSA) Claim number, thus acknowledging Joseph's retirement date.

In April 1990 the Nelson's divorced. A court order was issued which awarded Gladyce the partial benefit and was sent to OPM. In separate letters dated September 14, 1990, sent to Joseph and Gladyce, OPM stated it would honor the court order. OPM's letter referred to: "former spouses entitlement to a civil service survivor annuity to the extent expressly provided for in the terms of any court order, incident to divorce..." OPM commented that: "These provisions apply not only to Federal Government Employees, but to Federal retirees who were divorced

on or after May 7, 1985 and who had elected a survivor annuity for their spouse (now former spouse)." After the divorce, the deduction to fund the benefit for Gladyce continued for almost two years.

In August 1991 Joseph married his third wife, Bonnie. On May 7, 1992, OPM sent a letter to Joseph telling him to submit his marriage certificate for election of a benefit.

On June 10, 1992, OPM sent a letter to Joseph regarding a benefit for Bonnie. On June 30, 1992 OPM allowed Joseph to elect the full benefit instead of the remaining half.

On June 10, 1992, OPM sent a letter to Gladyce reversing themselves and denying the court order. OPM cited regulations which are not applicable to the Nelsons' situation.

After reviewing OPM's letter denying the court order, Gladyce requested reconsideration on July 2, 1992. In that letter Gladyce referred to the regulation OPM had cited in denying her court order. She stated "It does <u>not</u> apply to this case." Gladyce has always maintained that position, and has never suggested that she be made an "exception."

In July, 1993, Gladyce's attorney

filed a petition for review with the United States Court of Appeals for the Federal Circuit.

OPM's letter dated February 23, 1993 reaffirmed its' position. Gladyce appealed that decision to the Board in March, 1993.

On June 21, 1993, Judge Albornoz ruled in OPM's favor, but stated that had an election been made, it could have retained the benefit.

In February 1994, Gladyce, a Federal Benefits Consultant by profession, presented oral argument in her appeal to the U. S. Court of Appeals for the Federal Circuit in Washington, D.C.

In June, 1995, Gladyce submitted to the U. S. Court of Appeals for the Federal Circuit, the Legislative History Surrounding the CSRSEA and FEBIA, prepared by Legislative Research, Inc., dated June 5, 1995. That legislative history substantiated the legal position that she is covered for election and retention of the benefit.

REASONS FOR GRANTING THE WRIT

I.

This case involves an important issue regarding the interpretation of a Federal

Statute. This case will be used to block anyone who comes after me. The Court's decision to defer to OPM's erroneous opinion will remove the very protection that Congress intended to provide each and every employee and Member of Congress who retired before May 7, 1985 and who marry after that date and then later divorce. It affects their former spouses and health benefits as well.

OPM's error occurred when it misread the effective date language, and misapplied the exclusion for those married as of May 7, 1985, who had not elected the benefit before that date.

Based on undisputed evidence, Congressional intent is that CSRSEA as amended, does apply to former spouses of employees who retired before May 7, 1985 and who married or remarried and divorced after that date in accordance with 5 USC 8341(h) and 5 USC 8339(j)(3).

The lower court deferred to OPM's interpretation of the statute which disqualified Gladyce's court order. That ruling has the effect of nullifying 5 USC 8341(h) and 5 USC 8339(j)(3) with respect to employees who retire before May 7, 1985 and marry and divorce after that date.

In OPM's brief dated June 28, 1985, it stated that "it is not conceivable that those who qualify under these very

limited criteria will constitute a very large group." That statement is irrelevant. Even if only one person suffers from a wrong interpretation, an incorrect interpretation of the statute is an incorrect interpretation. It may have already been used to prevent former spouses from a benefit that the statute provides.

The statutory provisions that apply are as follows:

The benefit was elected for Gladyce under 5 CFR 831.631(b)(2), formerly 5 CFR 831.613(b)(2), and 5 USC 8339(j)(5)(C)(i).

Upon a divorce, 5 CFR 831.631(b)(5) states:

> any reduction in an annuity to provide a current spouse equity will terminate effective on the first of the month after the marriage to the current spouse ends, unless
>
> (i) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity or:
> (ii) A qualifying court order requires the retiree to provide a former spouse annuity.

5 USC 8339(j)(5)(A) provides:

> any reduction in an annuity...of a retired employee shall terminate for each full month
>
> (i) after the death of the spouse, or
>
> (ii) after the dissolution of the spouse's marriage to the employee or Member, except that an appropriate deduction shall be made if the spouse is entitled as a former spouse, to a survivor annuity under section 8341(h) of this title.

5 USC 8341(h)(1) provides:

> a former spouse of a Member, or annuitant is entitled to a survivor annuity under this subsection, if and to the extent expressly provided for in an election under Section 8339(j)(3) of this title, or in the terms of any decree of divorce.

5 CFR 838.802(a), CSRS Limitations provides:

> A court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the marriage terminated on or after May 7, 1985.

II

LEGISLATIVE HISTORY

The legislation pertaining to this case is:

1. The Civil Service Retirement Spouse Equity Act, (CSRSEA), P.L. 98-615, enacted on May 7, 1985.

2. The Federal Employees Benefits Improvement Act, (FEBIA), P.L. 99-215, enacted on February 27, 1986.

Civil Service Retirement Spouse Equity Act

Prior to CSRSEA, a married retiring employee had sole discretion in the election of a benefit. In the event of a post retirement divorce, the spouse could be awarded a portion of the annuity, but could not be awarded a benefit. The law at that time prohibited this award, even if the retired employee wanted to give the benefit to the former spouse.

An employee, single at time of retirement, who later married, could elect a benefit for the new spouse within one year of the marriage. Again, a divorce could not retain the benefit.

CSRSEA changed the law to allow former spouses to retain the benefit by either a court order, or election. This

applied to employees retiring, and divorcing after enactment of the law.

Legislative history shows the following dialog between the Chairman of the Subcommittee, William D. Ford, and Ms. Oakar during committee markup of CSRSEA.

The CHAIRMAN: Am I correct that the provisions of the bill which require OPM to honor court orders pertaining to survivor benefits are prospective only?

Ms. Oakar: That is correct. The provisions of this bill concerning court orders apply with respect to divorces which occur after the effective date of the bill. The bill does not affect court orders incident to prior divorces. H.R. 98-1054, 98th Cong.2d Sess.18 (1984). This language makes Congressional intent clear.

Effective May 7, 1985, OPM for the first time was authorized to recognize court orders granting survivor benefits to former spouses of Federal employees and retirees who divorce. The retiree can also elect within two years of a divorce to obtain or retain the benefit.

Section 2(4)(G) of CSRSEA added 8341(h) for court orders. Section 2(3)(A) added 8339(j)(3) for elections of the benefit within two years of a divorce. New Subsection 8339(j)(5)(C) applied to

remarriage after retirement and k(2) for those who marry after retirement.

In addition to retention of the benefit for former spouses, major changes were: Individuals married to an employee at retirement are automatically covered for election of the benefit. Marriages after retirement do not require the waiver. After retirement, the benefit if wanted for the current spouse, must be elected within two years of a marriage. A back payment is required. The benefit can be split between current and former spouse(s).

Section 4(a)(1) provides:

> Except as provided in paragraphs (3), (4), (5), and (6) and subsections (b) and (c), the amendments made by section 2 of this Act (amending 8331, 8334, 8339, 8341, 8342, 8345 and 8348 of this title) shall take effect May 7, 1985, and shall apply:
>
> > to any individual who on or after such date [May 7, 1985] is married to an employee or Member who, on or after such date retires, dies,...
>
> (5 USC 8341 note) (after CSRSEA was later amended this became (A))

The effective date was set - retired on or after May 7, 1985 for divorces on or after that date. That effective date language made those employees who retired before May 7, 1985 excluded from CSRSEA even if they divorced after that date.

Single people were not discriminated against because they were not married at retirement. Those who are single can later marry/remarry, and then optionally elect the benefit, and divorce. If a court orders the benefit for the former spouse, OPM is required to honor the court order whether elected or not. 5 USC 8341(h)(1). Election by the retiree within 2 years of a divorce can also retain or obtain the benefit. 5 USC 8339(j)(3). This is an established standard practice.

Federal Employees Benefits Improvement Act

The purpose of FEBIA was to improve CSRSEA, the Federal Employees' Health Benefits program, and make technical changes.

FEBIA amended CSRSEA to include employees retiring prior to the enactment of the law, May 7, 1985. It now allowed former spouses to retain the benefit, either by election or court order, if they too divorced after enactment of the law.

Pertaining to this case FEBIA made

election change requirements uniform for employees who retired before, on, or after May 7, 1985. The changes were: election of the benefit within two years of a marriage, and a back payment was required.

The provisions of House Report 3384 (Page 3), "Extended the former spouse provisions in CSRSEA to individuals married to retired employees or Members as of May 7, 1985." However, there is an "exclusion" as discussed below.

When Section 4(a)(1) was amended, the following effective date language, marked as subsection B, was added;

> (B) to an individual who, as of such date [May 7, 1985] is married to a retired employee or Member....

(5 USC 8341 Note) The effective date was set to now include those employees who retired before May 7, 1985 and divorced after that date.

Congress did not intend to create a class of people who were discriminated against because they were not married as of May 7, 1985. The single retiree could later marry/remarry, elect the survivor annuity benefit or not elect the benefit. If the benefit was elected (which is the Nelson situation) and they divorce, just like in CSRSEA above, a court ordered

benefit must be honored by OPM for those former spouses. 5 USC 8341(h). An election by the retiree within 2 years of a divorce could also retain the benefit. 5 USC 8339(j)(3). These former spouses were also covered for retention of the benefit because they too divorced on or after May 7, 1985.

Coverage under CSRSEA and FEBIA are parallel in this regard. If CSRSEA covers those who were single and who later marry and divorce, then equally, FEBIA also covers those who were single, marry, and divorce. This is true because of the identical effective date language in both these laws.

Employees who were married as of May 7, 1985, were only covered if the benefit had already been elected for the current spouse (either at retirement or during their post retirement marriage) before that date.

If retired employees were married as of May 7, 1985, had not made the election for their spouse (either at retirement or during their post retirement marriage or remarriage), they were not covered if they later divorced.

That is the "exclusion" we see in (B)...unless

to an individual who, as of such

> date, [May 7, 1985] is married to a retired employee or Member unless...(i) such employee or Member has waived ... the right of that individual's spouse to receive a survivor annuity, or (ii) in the case of a post-retirement marriage or remarriage, an election has not been made before such date by such employee or member with respect to such individual under the applicable provisions of section 8339(j)(1) or 8339(k)(2) of such title ...

Neither a court order nor an election can be used to obtain a benefit for those spouses. Why? Under the law prior to CSRSEA, a current spouse without eligibility for a survivor benefit cannot achieve greater rights merely by obtaining a divorce.

The statute was very specific in the exclusion mentioned above. OPM, however, misinterpreted the exclusion which caused a major error. Instead of applying the exclusion to the retired employees who were married as of May 7, 1985, who had a post retirement marriage or remarriage, OPM applied it to all employees who retired before May 7, 1985. That error resulted in OPM's erroneous position that all elections had to be made before May 7, 1985.

III

AGENCY REGULATIONS

The "exclusion" for those who did not have the benefit elected for them is specified in 5 CFR 838.1004(d)(2), formerly 831.1704(d)(2) and also 838.802(b). OPM used the exclusion for those married as of May 7, 1985, to disqualify Gladyce's court order, saying that the benefit had to be elected for her before May 7, 1985. The Merit Systems Protection Board and Judge Albornoz did the same thing. Therefore, OPM's reliance on this regulation to disqualify Gladyce's court order is erroneous and must be reversed.

Other than divorces before retirement, 5 CFR 838.1004(d)(2)(i), (ii),(iii), (A) and (B) is the only "exclusion" for court orders. That regulation provides:

> (d) For purposes of affecting or awarding a former spouse annuity a court order is not a qualifying court order whenever
> (1) the marriage was terminated before May 7, 1985; or
> (2)(i) the marriage was terminated on or after May 7, 1985; and
> (ii) the employee or Member retired under CSRS before

> May 7, 1985 and
> (iii)(A) the employee or Member had elected not to provide a current spouse annuity for the spouse at the time of retirement; or
> (B) In the case of a post-retirement marriage, the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985.

OPM's interpretation, as presently written, is in conflict with Congressional intent. To be in compliance with the statute, the wording in 5 CFR 838.1004(d)(2) should have stated:

> (ii) the employee or Member retired under CSRS before May 7, 1985, **was married as of May 7, 1985**, and...

IV

AGENCY DECISION

OPM told the court that the benefit had to be elected for Gladyce, and to anyone else similarly situated, before May 7, 1985, citing 5 CFR 838.1004(d)(2)(i), (ii), and (iii)(B). As shown above, this is wrong.

OPM also referred to the effective

date language, stating that section 4(a)(1) excluded Gladyce's court order because she was not (A) married to an employee who retired on or after May 7, 1985, or (B) married as of May 7, 1985 to a retired employee. As shown above, that is also wrong.

It appears that the lower court was under the assumption that only "married" individuals are covered. As discussed above, those who were single can later marry, divorce, and their former spouses are covered because they too divorce on or after May 7, 1985. 5 USC 8341(h) and 5 USC 8339(j)(3).

To support OPM's position, its brief dated June 28, 1995 quoted from a House Report which stated, "the bill, generally does not apply in the case of retirements or divorces before enactment." Even without this case, after FEBIA was enacted, that statement was no longer correct. OPM also quoted from the House Report, "Generally, the rights of any former spouse or the current spouse of an employee or Member are fixed at the time of retirement of the employee or Member and are not thereafter subject to modification." Had OPM continued and quoted the next sentence, the lower court would have read, "For example, if a former spouse who was divorced prior to retirement..." H.R. 98-1054, 98th Cong., 2d Sess. pgs 11 & 24. That language is

not applicable to this case.

An agency's interpretation of a statute, which it is charged with administering, is entitled to great deference by a reviewing court unless it finds that the interpretation of the statute is unreasonable. A rational person would not conclude that Congress would allow the retention of a benefit that was elected before the very law to protect the benefit was enacted, and then turn around and not allow the retention of the benefit that was elected after the law was enacted.

On the contrary, Congress was consistent when it allowed those who retired, married and elected the benefit before May 7, 1985, to retain it upon a divorce after that date. Congress was also consistent when it allowed those who retired before May 7, 1985, married and elected the benefit after that date to retain it upon a divorce.

V

ESTOPPEL

In the briefs submitted on Gladyce's behalf by her attorneys, the statutory issues were presented along with an estoppel issue. Joseph paid for a benefit for Gladyce through a reduction in his retirement annuity. OPM accepted the

money for nearly two years after the divorce. Both Joseph and Gladyce relied on the representation by OPM that the benefit was in place. As a result, OPM should be estopped from denying the benefit.

VI

CONCLUSION

The Petition for Writ of Certiorari should be granted. The lower court's ruling should be reversed because it gives deference to the position taken by OPM, which was based on an unreasonable interpretation of the law. Also, the ruling creates a class of people who, contrary to Congressional intent, are discriminated against because of their marital status.

The Petitioner's court order should be ruled as a qualifying court order acceptable for processing, and thus restoring the partial survivor annuity benefit.

Respectfully submitted,

Gladyce E. Nelson Dec. 10, 9

Gladyce E. Nelson

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W. Sacramento, CA 95691
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Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will apear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-3128

GLADYCE E. NELSON

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent.

JUDGEMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S) SF0831930384-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, PLAGER, and SCHALL, (Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED Feb 22 1995 s/ Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: July 25, 1995

A True Copy

Attest:

_____
Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

GLADYCE E. NELSON Appellant, v. OFFICE OF PERSONNEL MANAGEMENT Agency (CSA= 2 250 476)	DOCKET NUMBER SF0831930384-I-1 DATE: June 21, 1993

GLADYCE E. NELSON, West Sacramento, CA, pro se

KENNETH R. BROWN, Washington, D.C., for the agency.

JOSEPH M. NELSON, Folsom, CA, intervenor

BEFORE

Laura M. Albornoz
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the agency's February 23, 1993 reconsideration decision that denied her application for a survivor annuity as a former spouse. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. 8347(d)(1).

For the reasons set forth below, the agency's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The undisputed evidence of record (1) shows that Joseph M. Nelson retired from the Federal Service on July 20, 1979. At that time, he elected to have his annuity reduced to provide a survivor annuity for his spouse, Gertrude A. Nelson. See Initial Appeal File (IAF), Tab 4, Subtab 6. On December 13, 1984, Gertrude died in an automobile accident and Nelson's full

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(1) On May 18, 1993, a telephonic hearing was held in the appeal. The agency was notified of the hearing date, but waived the opportunity to participate. Therefore, this decision is based on the parties' submissions, and the testimony provided on behalf of the appellant and the intervenor.

annuity was restored.

Thereafter, on September 20, 1986, Nelson married the appellant. On February 17, 1987, Nelson elected to have his annuity reduced to provide a survivor annuity for the appellant. (2) See IAF, Tab 9. The marriage ended in divorce on April 24, 1990. The judgment of dissolution entered in the Superior Court of California, County of Sacramento, incorporated the parties' "Marital Settlement Agreement." See IAF, Tab 4, Subtab 5. In the agreement, Nelson promised to "retain. . . (the appellant) as the beneficiary of his Civil Service Retirement Annuity." Id.

On September 14, 1990, the agency informed the appellant that the judgment of dissolution appeared to be a "qualifying court order," and awarded her a survivor annuity as the former spouse of Nelson. See IAF, Tab 4, Subtab 4. However, on June 10, 1992, the agency determined its evaluation was in error. The agency found, pursuant to 5 C.F.R. 831.1704(d)(2)(iii)(B), that the judgment of dissolution was not a "qualifying court

---

(2) Nelson elected survivor benefits within two years after his remarriage as required under 5 C.F.R. 831.613(b)(2), although he did not finish paying the required deposit within the two year period.

order" because Nelson retired before May 7, 1985, his marriage to the appellant terminated after May 7, 1985, and he did not elect a survivor annuity for the appellant prior to May 7, 1985. See IAF, Tab 4, Subtabs 2 and 4.

The appellant contends that she is entitled to a survivor annuity as Nelson's former spouse under 5 C.F.R. §31.613(b)(2) and because the April 24, 1990 judgment of dissolution is a "qualifying court order." See IAF, Tab 11. The appellant and her expert witness, Mary Taylor, a Federal benefits consultant, testified that 5 C.F.R. §31.1704(d)(2)(iii)(B) did not apply. Taylor testified that because Nelson and the appellant were not married before May 7, 1985, Nelson could not have elected benefits for the appellant prior to May 7, 1985. Taylor argued that the provision did not apply because it would penalize the appellant for something over which she had no control, the date of her marriage. See Hearing Tape, Side A.

On August 4, 1991, Nelson married his current spouse, Bonnie Jean, and elected survivor annuity benefit in her favor. Bonnie Jean is currently entitled to a survivor annuity benefit as Nelson's spouse.

Burden of Proof

Where, as here, the reconsideration decision involves benefits for which the

appellant has applied, the appellant bears the burden of proof by a preponderance of the evidence. See 5 C.F.R. 1201.56(a)(2).

The judgment of dissolution is not a qualifying court order.

The regulations at 5 C.F.R. 831.613(b) provide, in pertinent part:

> [I]n cases involving retirees who retired on or after May 7, 1985, or married on or after February 27, 1986 --
>
> (2) A retiree who was married at the time of retirement may elect, within 2 years after a post-retirement marriage --
>
> (i) A fully reduced annuity
>
> ....

5 C.F.R. 831.613(b) (emphasis added). The undisputed evidence of record shows, and I find, that Nelson, who was married at the time of his retirement, entered into a post-retirement marriage with the appellant after February 27, 1986, and elected a reduced annuity within 2 years of the marriage to provide a survivor annuity in her favor. Thus, the appellant was entitled to a survivor annuity when she was Nelson's spouse. However, upon divorce, 5 C.F.R. 831.613(b)(5), provides:

> Any reduction in an annuity to

> provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless --
>
> (i) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity; or
>
> (ii) a qualifying court order requires the retiree to provide a former spouse annuity.

5 C.F.R. 831.613(b)(5). I find that the appellant has failed to present any evidence Nelson elected to provide her with a former spouse survivor annuity after the divorce to satisfy the requirement of subsection (i). Thus, the appellant's survivor annuity terminates unless she satisfies subsection (ii) and shows by a preponderance of the evidence that a qualifying court order awards her a survivor annuity as a former spouse.

The regulations, formerly at 5 C.F.R. 831.1704, defined a "qualifying court order." Those regulations were re-codified at 5 C.F.R. Part 838, effective January 1, 1993. The applicable regulation at 5 C.F.R. 838.1004(d) provides:

> For the purposes of awarding a former spouse annuity, the court order is not a qualifying court order whenever --
> (1) The marriage was terminated before May 7, 1985; or
>
> (2) (i) The marriage was terminated on or after May 7, 1985; and
>
> (ii) The employee or Member retired under CSRS before May 7, 1985; and
>
> (iii)(A) The employee or Member had not elected to provide a current spouse annuity for that spouse at the time of retirement; or
>
> (B) In the case of a post-retirement marriage, the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985.

5 C.F.R. 838.1004(d) (emphasis added). The undisputed evidence of record, as noted above, shows that the appellant's marriage to Nelson was terminated after May 7, 1985, that Nelson retired under CSRS before May 7, 1985, (see IAF, Tab 4, Subtab 6), and when Nelson married the appellant in a post-retirement marriage, he had not elected to provide her with a survivor annuity before May 7, 1985.

Thus, I find that the final judgment dissolving the Nelson's marriage on April 24, 1990, is not a qualifying court order because the court order meets the requirements of 5 U.S.C. 838.1004(d) at subsection (2)(i) and (ii) and (iii)(B).

Moreover, 5 C.F.R. 838.802, entitled "CSRS limitations," provides:

> In the case of a retiree who retires under CSRS before May 7, 1985, a court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the retiree was receiving a reduced annuity to provide a survivor annuity to benefit <u>that spouse</u> before May 7, 1985.

5 C.F.R.838.802(b) (emphasis added).

For the reasons set forth above, I find that the appellant has failed to meet her burden of showing, by a preponderance of the evidence, that a qualifying court order awards her a survivor annuity as a former spouse. Thus, I find that the appellant has failed to meet the exceptions at 5 C.F.R. 831.613(b)(5)(i) or (ii). And, her entitlement to a survivor annuity terminated upon her divorce from Nelson on April 24, 1990.

As noted above, the appellant and her expert witness, Taylor, testified that the

appellant is equitable entitled to a survivor annuity because applying the regulations would penalize the appellant for something over which she had no control, the date of her marriage. However, where, as here, monetary benefits are not otherwise permitted by law, the government cannot be estopped from denying those benefits because of equitable considerations. See Office of Personnel Management v. Richmond, 496 U.S. 414, rehearing denied, 497 U.S. 1046 (1990).

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:

s/Laura M. Albornoz
Laura M. Albornoz
Administrative Judge

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GLADYCE E. NELSON Appellant, v. OFFICE OF PERSONNEL MANAGEMENT Agency, and JOSEPH M. NELSON Intervenor, (CSA 2 250 476	Docket Number SF0831930384-I-1 DATE: Nov 26 1993

Robin L. Klomparens, Esquire, Sacramento, California, for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency

Joseph M. Nelson, Folsom, California, pro se.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision that sustained the reconsideration decision of the Office of Personnel Management (OPM). For the reasons set forth below, we find that the petition does not meet the criteria for review set forth a 5 C.F.R. 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING OPM's reconsideration decision.

BACKGROUND

The following facts are not in dispute.

Intervenor Joseph Nelson retired under the Civil Service Retirement System (CSRS) in 1979 while he was married to Gertrude Nelson. Initial Appeal File (IAP), Tab 4, Subtab 6 at 22-23. Gertrude Nelson died in 1984, and Joseph Nelson married the appellant on September 20, 1986. Id., Subtab 5 at 5, Subtab 6 at 17. In 1988, Joseph Nelson elected to have his annuity reduced to provide a survivor

annuity for the appellant. Id., Subtab 6 at 8. The appellant and Joseph Nelson were divorced in 1990. Id., Subtab 5 at 4. The court order by which the marriage was dissolved provided in part that Joseph Nelson would "retain (the appellant) as the beneficiary of his Civil Service Retirement Annuity. Said retirement annuity shall continue to be reduced to provide the survivor annuity indicated herein." Id (divorce decree at para.8.1).

OPM, after receiving a copy of the court order from the appellant, notified her that it "intend(ed) to honor" the order. IAF, Tab 4, Subtab 4 at 2-5. Almost two years later, OPM reversed its position, advising the appellant that, after further review of her situation, it had determined that the divorce decree was not a "qualifying court order" for purpose of awarding her former spouse survivor benefits. Id at 1. Specifically, OPM held that, by regulation, two conditions, when taken together, precluded it from honoring the court order: The order dissolved a marriage that did not take place until after May 7, 1985, when OPM received statutory authorization to honor orders awarding survivor benefits; and the marriage was to an annuitant who retired before OPM received such authorization. Id. Upon the appellant's request for reconsideration, IAF, Tab 4, Subtab 3, OPM again concluded that it could not honor the court order, id., Subtab 2.

The appellant, in proceedings on her petition for appeal, conceded that the regulations upon which OPM relied it its reconsideration decision, if applied literally, precluded it from honoring the court order; she argued, though, that the regulations should not apply to her because she had no control over the date of her marriage to Joseph Nelson. See IAF, Tab 1; Hearing Transcript. The administrative judge rejected the appellant's position and sustained OPM's reconsideration decision. IAF., Tab 13.

The appellant reiterates in her petition for review her argument that OPM's regulations should not apply to her Petition for Review File (PRF), Tab 1. She also argues that the court order, which was signed by Joseph Nelson, should be treated as an election to provide her with a former spouse survivor annuity; OPM should be estopped from denying her the former spouse survivor benefits; and she should be awarded survivor benefits because OPM failed to notify Joseph Nelson of his right to elect such benefits for her. Id.(1) Joseph Nelson opposes the

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(1) We deem the appellant, who appeared pro se below, to have designated Ms. Klomparens as her representative when she signed the "Verification" of the petition for review that Ms. Klomparens prepared and filed. PRF, Tab 1; cf. 5 C.F.R. 1201.31(a).

petition for review. PRF, Tab 3. OPM has not responded to the petition. (2)

ANALYSIS

Absent express statutory authority, OPM may not honor the court order that required Joseph Nelson to continue to have his CSRS annuity reduced to provide survivor benefits for the appellant. See 5 U.S.C. 8346(a) (CSRS) benefits are exempt from legal process, except as provided for by federal law). OPM based its reconsideration decision on 5 C.F.R. 838.1004(d)(2)(iii)(B), (3) which provides in relevant part that, "[i]n the case

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(2) We have not considered the appellant's "Reply Petition for Review of Initial Decision." PRF, TAB 4, The appellant filed her reply 22 days after the record closed, and she has not shown (or even alleged) that the reply is based on evidence that was not readily available before the record closed. See 5 C.F.R. 1201.114(i).

(3) OPM cited 5 C.F.R. 831.1704(d)(2)(iii)(B) in its February 23, 1993 reconsideration decision. IAF, Tab 4, Subtab 2. That provision was redesignated as 5 C.F.R. 838.1004(d)(2)(iii)(B), effective August 28, 1992. See 57 Fed. Reg. 33570. 33597 (daily ed. July 29, 1992).

of a post-retirement marriage," OPM will not honor a court order purporting to award a former spouse survivor annuity where "the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985." See IAF, Tab 4, Subtab 2. The appellant's claim that the regulation was not meant to apply to her is, in essence, a claim that Congress actually intended for OPM to honor orders such as the one that dissolved her marriage to Joseph Nelson. Although OPM and the administrative judge correctly determined that the appellant is not entitled to CSRS survivor benefits, they did not analyze the statutory provisions upon which 5 C.F.R. 838.1004(d)(2)(iii)(B) is based. We reopen the appeal in order to do so.

The Civil Service Retirement Spouse Equity Act (CSRSEA), Pub. L. No. 98-615, 98 Stat. 3195, became law on November 8, 1984, and went into effect on May 7, 1985. See 5 U.S.C. 8341 note. The House Post Office and Civil Service Committee observed that, under the law as it existed prior to the CSRSEA, "a court [could] order [OPM] to pay all or a portion of an employee's ... annuity [payable during the employee's life] to a former spouse, but a court [could] not require that a survivor benefit be provided for a former spouse." H.R. No. 98-1054, 98th Cong., 2d Sess. 11 (reprinted in 1984 U.S. Code Cong. & Admin. News 5540, 5541). Section 2(4)(G) of the CSRSEA authorized OPM to honor a

court order awarding CSRS survivor benefits to the former spouse of an employee or retiree. See 5 U.S.C. 8341(h)(1).

Section 2(3)(A) of the CSRSEA made two additional changes to the CSRS that are relevant to this appeal. First, it allowed a retiree to elect to provide a survivor annuity for a spouse acquired after retirement, so long as the retiree had been married at the time of retirement. 5 U.S.C. 8339(j)(5)(C)(i). The latter spouse's right to receive a survivor annuity would terminate upon his or her divorce from the retiree, unless the spouse was entitled to a survivor annuity under the terms of a court order. 5 U.S.C. 8339(j)(5)(A). Second, a retiree could elect to provide a survivor annuity for a former spouse within two years of the date that his or her marriage to that spouse was disslved. 5 U.S.C. 8339(j)(3).

Congress did not intend for the statutory changes described above to have universal application, however. Section 4 (a)(1) of the CSRSEA, as amended, provides as follows:

> Except as provided in paragraphs (3), (4), (5), and (6) and subsections (b) and (c), the amendments made by section 2 of this ACT shall take effect May 7, 1985, and shall apply--
> (A) to any individual who, on or after such date, retires, dies, or

> applies for a refund of [CSRS] contributions ..., and (B) to any individual who, as of such date, is married to a retired employee ... .

5 U.S.C. 8341 note. Joseph Nelson retired -- that is, he ceased being an "employee" -- in 1979, and the appellant did not marry him until 1986. Thus, she does not fall into either of the two primary categories of people to whom the CSRSEA applies. The six exceptions referenced in section 4(a)(1) above expand the coverage of portions of the CSRSEA to certain other classes of people, but they do not expand the coverage of the relevant portion of section 2(4)(G); specifically, none of the exceptions authorizes OPM to honor a court order awarding survivor benefits to the former spouse of a CSRS annuitant, where the annuitant retired before May 7, 1985, and the former spouse married the annuitant after that date. See 5 U.S.C. 8341 note. (4)

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(4) Section 4(a)(6) of the CSRSEA, as amended, expands the coverage of section 2(4)(G) to all marriages occurring after May 7, 1985, "but only to the extent that [section 2(4)(G)] amends title 5 [U.S.C.], by adding a new section 8341(i)." See 5 U.S.C. 8341 note. Section 8341(i) relates to duration-of-marriage requirements for eligibility for survivor benefits. The authority for OPM to honor court orders relating to survivor benefits, also added by section 2(4)(G), appears at 5 U.S.C. 8341(h)

Contrary to the appellant's contention, then, the court order that dissolved her marriage to Joseph Nelson did not preserve her right to receive a survivor annuity, because the authority for OPM to honor court orders awarding survivor annuities is inapplicable. Rather, her right to receive a CSRS survivor annuity terminated upon her divorce from Joseph Nelson. 5 U.S.C. 8339(j)(5)(A). Moreover, the appellants's claim that the regulation upon which OPM relied in its reconsideration decision, 5 C.F.R. 831.1004(d)(2)(iii)(B), should not apply here because there is nothing that she "could have possibly done ... to avoid the court order ... being deemed non-qualified," PRF, Tab 1 at 7, misses the point. Based on the language of the statute, we conclude that Congress did not intend for the provisions of the CSRSEA that relate to the award of former spouse survivor benefits to apply to the appellant and those similarly situated. The regulation carries our this intent.

The appellant's remaining arguments on review are meritless. Assuming arguendo that a court order signed by a CSRS annuitant and submitted to OPM by his former spouse could otherwise serve as an election to provide a former spouse survivor annuity, the order that dissolved the appellant's marriage to Joseph Nelson cannot constitute such an election because

it is not permitted by statute. An annuitant may elect to provide a former spouse survivor annuity under 5 U.S.C. 8339(j)(3). Section 8339(j)(3) was added to the CSRS by section 2(3)(A) of the CSRSEA; section 2(3)(A) applies, in the case of a spouse acquired after retirement and after May 7, 1985, "only to the extent that [the CSRSEA] amends title 5 [U.S.C.] by adding a new section 8339(j)(5)(C).. ." See 5 U.S.C. 8341 note (sections 4(a)(1) & 4(a)(4)(A)). Thus, Joseph Nelson elected during his marriage to the appellant to provide her with a survivor annuity pursant to 5 U.S.C. 8339(j)(5)(C)(i), but he could not elect to provide her with a survivor annuity under section 8339(j)(3) after their marriage terminated.

Further, OPM cannot be estopped from denying former spouse survivor benefits to the appellant, regardless of the equities, because, as explained above, she is not entitled to such benefits under the applicable statutes. Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)

Finally, OPM did not err in failing to advise Joseph Nelson that he could elect a former spouse survivor annuity for the appellant. Again, once his marriage to the appellant terminated, so did her right to receive CSRS benefits; Joseph Nelson could not revive her right to receive such an annuity by a post-divorce election.

In summary, OPM correctly determined that the apellant is not entitled to former spouse survivor benefits by virtue of her marriage to Joseph Nelson, because he retired before May 7, 1985, and she did not marry him until after that date. We therefore SUSTAIN OPM's reconsideration decision.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

FOR THE BOARD: s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Court

Washington, D.C.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed, and ADDENDUM-PETITION/SUGGESTION having also been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 24, 1955.

FOR THE COURT
FRANCIS X. GINDHART,
CLERK

Dated: July 17, 1995

By Diane M. Frye
Chief Deputy Clerk

cc: Gladyce E. Nelson
William K. Oliver

NELSON V OPM, 94-3126
(MSPB - SF0831930364I-1)

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* Note: Pursuant to Fed. Cir. R. 47.6,
* this order is not citable as precedent.
* It is a public record.
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